

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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IN RE: VITAMINS ANTITRUST LITIGATION

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Misc. No. 99-197 (TFH)  
MDL No. 1285

This document relates to:

ANIMAL SCIENCE PRODUCTS, INC., et al.,

Plaintiffs,

v.

CHINOOK GROUP, LTD., et al.,

Defendants.

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**FILED**

**JUL 17 2001**

**NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT**

**FINAL ORDER APPROVING  
SETTLEMENT AND FINAL JUDGMENT**

This Court having considered plaintiffs' motion for final approval of the settlement agreement entered into as of December 1, 2000 on behalf of plaintiffs and the Akzo Settlement Class (as defined therein) by Plaintiffs' Co-Lead Counsel and by Akzo Nobel Chemicals B.V. and Akzo Nobel Inc. (the "Settling Defendants") by their counsel, and the exhibits attached thereto (the "Settlement Agreement," a copy of which is attached hereto as Exhibit 1); having considered all of the submissions and arguments with respect to plaintiffs' motion; having entered an order on March 9, 2001 conditionally certifying the following settlement class:

All persons or entities who directly purchased Vitamin B4 (Choline Chloride) in the United States or for delivery in the United States from any of the Defendants or their co-conspirators from January 1, 1988 through December 31, 1998. Excluded from the class are all

governmental entities, Defendants, their co-conspirators, and their respective subsidiaries and affiliates;

having directed that notice be given to potential members of the Akzo Settlement Class of the proposed settlement and of a hearing scheduled to determine whether the proposed settlement should be approved as fair, reasonable, and adequate to the Akzo Settlement Class and to hear any objections to any of these matters (the "Settlement Hearing"); and having held the Settlement Hearing and considered the submissions and arguments made in connection therewith, the Court hereby FINDS:

1. That the notice to potential members of the Akzo Settlement Class required by Fed. R. Civ. P. 23(e), including but not limited to the forms of notice and the means of identifying and giving notice to potential members of the Akzo Settlement Class, has been given in an adequate and sufficient manner and constitutes the best notice practicable, complying in all respects with such rule and the requirements of due process.

2. That the Court has held a hearing to consider the fairness, reasonableness and adequacy of the proposed settlement, has been advised of all objections to the settlement and has given fair consideration to such objections.

3. That arm's length negotiations have taken place in good faith between Plaintiffs' Co-Lead Counsel and the Settling Defendants and have resulted in the proposed settlement, as provided in the Settlement Agreement.

4. That the settlement, as provided for by the Settlement Agreement, is in all respects fair, reasonable, and adequate and in the best interests of the Akzo Settlement Class; that the Akzo Settlement Class satisfies the requirements of Fed. R. Civ. P. 23; that the designated settlement class representatives satisfy the requirements of Fed. R. Civ. P. 23; that the settlement is accordingly

finally APPROVED pursuant to Fed. R. Civ. P. 23(e); and that, in accordance with the terms of the Settlement Agreement, which are hereby incorporated by reference as though fully set forth herein, it is hereby ORDERED, ADJUDGED and DECREED:

(a) That all claims in the captioned action against the Settling Defendants are hereby dismissed with prejudice;

(b) That the Releasees, as defined in the Settlement Agreement, shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, damages whenever incurred, liabilities of any nature whatsoever, including without limitation costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, asserted or unasserted, in law or equity, which Releasors or any of them, whether directly, representatively, derivatively or in any other capacity, ever had, now have or hereafter can, shall or may have, relating in any way to any conduct prior to the date hereof concerning the purchase, sale or pricing of Vitamin Products and any and all other vitamins or relating to any conduct alleged in the Class Action, including, without limitation, any such claims which have been asserted or could have been asserted in the Class Action against the Releasees or any of them except that this release shall not affect the rights of Releasors or any of them (i) to seek damages or other relief from any person with respect to any Vitamin Products or vitamins purchased directly from the manufacturer (or any subsidiary or affiliate thereof) outside the United States for delivery to a destination outside the United States; or (ii) to participate in or benefit from any relief or other recovery as part of a settlement or judgment on behalf of a class of indirect purchasers or Vitamin Products;

(c) That the foregoing release shall not release any product liability or breach of contract claims unrelated to the subject matter of the Class Action;

(d) That no member of the Akzo Settlement Class shall hereafter be permitted in any suit, action, or proceeding to dispute or seek to establish liability against any Releasees;

(e) That, in addition to the provisions of subparagraphs (b), (c), and (d) of this paragraph, each Akzo Settlement Class Member is hereby deemed expressly to have waived and released, with respect to the Released Claims, any and all provisions, rights and benefits conferred by (a)§ 1542 of the California Civil Code, which reads:

" A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release. which if known by him must have materially affected his settlement with the debtor."

and (b) any similar state, federal or other law, rule or regulation or principle of common law. Each Akzo Settlement Class Member may hereafter discover facts other than or different from those that it knows or believes to be true with respect to the subject matter of the Released Claims, but each Akzo Settlement Class Member as a Releasor shall hereby be deemed to have waived and fully, finally and forever settled and released any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim with respect to the Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such other or different facts;

(f) That for a period of five years, the Clerk of the Court shall preserve a record of those potential members of the Akzo Settlement Class that have timely excluded themselves from the Akzo Settlement Class and shall provide a certified copy of such records to Settling Defendants at their expense;

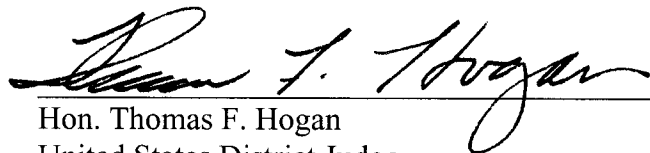
(g) That nothing in this Order and Judgment or the Settlement Agreement and no aspect of the settlement or the negotiation thereof is or shall be deemed or construed to be an admission or concession or evidence of any violation of any statute or law or of any liability or wrongdoing by Settling Defendants or of the truth of any of the claims or allegations contained in the complaint in the Class Action or any other pleading or of the propriety of certifying a class of any direct or indirect purchasers of Vitamin Products or Choline Chloride other than the Akzo Settlement Class, and evidence thereof shall not be discoverable or used, directly or indirectly, in any way, whether in the Class Action or in any other action or proceeding; and

(h) That there is no just reason for delay of entry of a final judgment of dismissal with prejudice as to the Settling Defendants, and that, pursuant to Fed. R. Civ. P. 54(b), the Clerk is therefore directed to enter this judgment, which shall be final and appealable.

5. Without affecting the finality of this Order and Judgment, the Court hereby retains jurisdiction of this settlement and the Settlement Agreement; including the administration and consummation of the settlement and the determination of issues relating to attorneys' fees and expenses and distribution to the members of the Akzo Settlement Class, and further retains exclusive jurisdiction for purposes of any suit, action or proceeding arising out of or relating in any way to this Order and Judgment, the settlement, the Settlement Agreement and/or the applicability of the Settlement Agreement, and the Settling Defendants and each member of the Akzo Settlement Class shall hereby be deemed to have consented to such exclusive jurisdiction of the Court for such purposes. Without limiting the generality of the foregoing, any dispute concerning the provisions of paragraphs 4(b), (c), (d) or (e) of this Order and Judgment, including but not limited to any suit, action or proceeding in which the provisions of paragraphs 4(b), (c), (d) or (e) are asserted as a

defense in whole or in part to any claim or cause of action asserted by any plaintiff or otherwise raised as an objection, shall constitute a suit, action or proceeding arising out of or relating to this Order and Judgment. Solely for purposes of any such suit, action or proceeding, to the fullest extent possible under applicable law, the Settling Defendants and the members of the Akzo Settlement Class are deemed to have irrevocably waived and to have agreed not to assert, whether by way of motion, as a defense or otherwise, any claim, argument or objection that they are not subject to the jurisdiction of this Court or that this Court is in any way an improper venue or an inconvenient forum.

6. Terms used in this Order and Judgment that are defined in the Settlement Agreement are, unless otherwise defined herein, used in this Order and Judgment as defined in the Settlement Agreement.

  
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Hon. Thomas F. Hogan  
United States District Judge

Dated: July 17, 2001

## **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 17 2001

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

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IN RE VITAMINS ANTITRUST LITIGATION

This filing relates to:

ANIMAL SCIENCE PRODUCTS, INC., et al.,

Plaintiffs.

Misc. No. 99-197 (TFH)  
MDL No. 1285

- against -

CHINOOK GROUP, LTD., et al.

Defendants.  
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SETTLEMENT AGREEMENT

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This Settlement Agreement (hereinafter, "Agreement") is made and entered  
into as of the 1st day of December, 2000, by and between Akzo Nobel Chemicals B.V. and  
Akzo Nobel Inc. (collectively referred to herein as "Akzo"), and the Akzo Settlement Class (as  
defined herein) in the above-captioned action (the "Class Action");

WHEREAS, there is pending in the United States District Court for the District  
of Columbia a multidistrict consolidated proceeding comprised of actions, including the Class  
Action, brought on behalf of direct purchasers of various vitamins and vitamin products cap-  
tioned as In re Vitamins Antitrust Litigation, Misc. No. 99-0197, M.D.L. No. 1285



(hereinafter, the "MDL Proceedings"), in which plaintiffs have alleged violations of law, including the existence of unlawful conspiracies to fix, raise, maintain, or stabilize the prices of certain Vitamin Products (as defined herein) in the United States and elsewhere in violation of Section 1 of the Sherman Antitrust Act, and other wrongful anti-competitive conduct in violation of various federal and state laws;

WHEREAS, Akzo has asserted a number of defenses to the claims asserted by the Class Plaintiffs (as defined herein);

WHEREAS, the Class Plaintiffs and Akzo agree that neither this Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against Akzo or any of its alleged co-conspirators or evidence of the truth of any of the Class Plaintiffs' allegations;

WHEREAS, arm's length settlement negotiations have taken place between Class Plaintiffs' Co-Lead Counsel and Akzo, and this Agreement, including its exhibits, which embodies all of the terms and conditions of the settlement between Akzo and the Akzo Settlement Class, has been reached, subject to the approval of the Court and Final Approval as provided herein;

WHEREAS, Class Plaintiffs' Co-Lead Counsel have concluded, after due investigation and after carefully considering the relevant circumstances, including, without limitation, the claims asserted in the Second Consolidated Amended Class Action Complaint

filed in the Class Action, the legal and factual defenses thereto and the applicable law, that it would be in the best interests of the Akzo Settlement Class to enter into this Agreement in order to avoid the uncertainties of litigation and to assure that the benefits reflected herein are obtained for the Akzo Settlement Class and, further, that Class Plaintiffs' Co-Lead Counsel consider the settlement set forth herein to be fair, reasonable and adequate and in the best interests of Class Plaintiffs and all members of the Akzo Settlement Class:

WHEREAS, the Class Action will continue against those Defendants that are not Releasees (as defined herein); and

WHEREAS, Akzo, despite its belief that it has good defenses to the claims asserted against it in the MDL Proceedings, including the Class Action, has nevertheless agreed to enter into this Agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, and thereby to put to rest this controversy with respect to the Akzo Settlement Class;

NOW, THEREFORE, it is agreed by and between the undersigned, on behalf of Akzo and the Akzo Settlement Class, that the Class Action be settled, compromised and dismissed on the merits and with prejudice as to Akzo and all other Releasees and, except as hereafter provided, without costs against the Akzo Settlement Class or Akzo, subject to the approval of the Court, on the following terms and conditions:

1. Class Definition. Subject to the Court's approval and for the purposes of this Agreement only, the undersigned agree and consent to the certification of the following Akzo Settlement Class in the Class Action:

All persons or entities who directly purchased vitamin B4 (choline chloride) in the United States or for delivery in the United States from any of the Defendants or their co-conspirators from January 1, 1988 through December 31, 1998. Excluded from the class are all governmental entities, Defendants, their co-conspirators, and their respective subsidiaries and affiliates.

2. Definitions. As used in this Agreement, the following terms shall be defined as indicated:

(a) "Akzo Settlement Class Member" means any person falling within the definition of the Akzo Settlement Class defined in paragraph 1 hereof that has not timely and validly excluded itself from the Akzo Settlement Class in accordance with the procedure to be established by the Court.

(b) "Class Counsel" means both (i) those attorneys or law firms retained as counsel for any Class Plaintiff and (ii) those attorneys or law firms that receive any portion of the attorneys' fee awarded by the Court in connection with this Settlement.

(c) "Class Plaintiffs" means the named plaintiffs in the Class Action.

(d) "Court" means the United States District Court for the District of Columbia.

(e) "Defendant" means any person or entity named as a defendant in the Class Action.

(f) "Escrow Account" means the account established for receipt of Akzo's payment pursuant to paragraph 7 hereof.

(g) "Final Approval" means the first date upon which each of the following three conditions shall have been satisfied:

- a) The Settlement has been approved in all respects by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure;
- b) Entry has been made, as provided in paragraph 6 hereof, of the final judgment of dismissal in substantially the form of Exhibit D hereto; and
- c) Either (i) the time to appeal, or to seek permission to appeal, the Court's approval of the Settlement as described in a) hereof and entry of final judgment as described in b) hereof has expired with no appeal having been taken or permission to appeal having been sought; or (ii) such approval and final judgment have been affirmed in their entirety by the court of last resort to which any appeal has been taken or petition for review has been

presented and such affirmance has become no longer subject to the possibility of further appeal or review.

(h) "Released Claims" shall have the meaning set forth in paragraph 15 hereof.

(i) "Releasees" means Akzo Nobel Chemicals B.V., Akzo Nobel Inc., their respective direct and indirect parents (including without limitation Akzo Nobel N.V.), subsidiaries and affiliates, the present and former officers, directors, members of any supervisory board or board of management, employees, agents, and legal representatives of each of the foregoing, and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing; provided, however, that for purposes of this Agreement, "Releasees" does not include any of the individuals or entities identified in Exhibit A hereto. As used in this definition, "affiliates" means entities controlling, controlled by or under common control with a Releasee.

(j) "Releasers" means each Akzo Settlement Class Member on its own behalf and on behalf of its respective direct and indirect parents, subsidiaries and affiliates, the present and former officers, directors, employees, agents, and legal representatives of each of the foregoing, and the predecessors, successors, heirs, executors, administrators and assigns of each of the foregoing. As used in this

definition, "affiliates" means entities controlling, controlled by or under common control with a Releasor.

(k) "Settlement" means the settlement of the Released Claims set forth herein.

(l) "Settlement Fund" means the payment made by Akzo pursuant to paragraph 7 hereof, including any interest accrued on such payment after it is made by Akzo.

(m) "Settlement Hearing" shall have the meaning set forth in paragraph 5 hereof.

(n) "United States" means the United States and its territories and possessions.

(o) "Vitamin Product(s)" means (i) the following vitamins and carotenoids: vitamin A, astaxanthin, vitamin B1 (thiamin), vitamin B2 (riboflavin), vitamin B3 (niacin), vitamin B4 (choline chloride), vitamin B5 (calpan), vitamin B6, vitamin B9 (folic acid), vitamin B12 (cyanocobalamine pharma), beta-carotene, vitamin C, canthaxanthin, vitamin E and vitamin H (biotin), as well as all blends and forms of the foregoing, and (ii) premix, which is defined to mean any product that contains one or more Vitamin Products in combination with other

substances (such as other active ingredients or dilution agents) and is sold as a premixed formulation.

3. Reasonable Best Efforts to Effectuate This Settlement. Class Plaintiffs' Co-Lead Counsel agree to recommend approval of this Agreement by the Court and by the members of the Akzo Settlement Class. Class Plaintiffs' Co-Lead Counsel and counsel for Akzo agree to undertake their reasonable best efforts, including all steps and efforts contemplated by this Agreement and any other steps and efforts that may be necessary or appropriate, by order of the Court or otherwise, to carry out the terms of this Agreement.
4. Motion for Preliminary Approval. As soon as is possible and in no event later than 10 days after execution of this Agreement, Class Plaintiffs' Co-Lead Counsel shall submit to the Court a motion for preliminary approval of the Settlement and the final judgment contemplated by this Agreement and for a stay of all proceedings in the Class Action against Akzo until the Court renders a final decision regarding the approval of the Settlement and, if it approves the Settlement, enters the final judgment. The motion shall include (a) the proposed form of order preliminarily approving this Agreement attached as Exhibit B hereto, (b) the proposed forms of mail notice and publication notice of the Settlement to members of the Akzo Settlement Class attached as Exhibit C hereto and (c) the proposed form of order and final judgment attached as Exhibit D hereto. The parties hereto shall request that a decision be made promptly on the papers or that a hearing on Class Plaintiffs' motion for preliminary approval of the Settlement be held at the earliest date available to the Court.

5. Notice to Akzo Settlement Class. In the event that the Court preliminarily approves the Settlement, Class Plaintiffs' Co-Lead Counsel shall, in accordance with Rule 23 of the Federal Rules of Civil Procedure and the Court's order, provide those members of the Akzo Settlement Class who have been identified by reasonable means with notice by first class mail of the conditional certification of the Akzo Settlement Class and the date of the hearing scheduled by the Court to consider the fairness, adequacy and reasonableness of the proposed settlement (the "Settlement Hearing"). Such notice shall provide that, if the Court approves this Settlement following the Settlement Hearing, Class Plaintiffs' Co-Lead Counsel shall propose a plan for distribution of the Settlement Fund among Akzo Settlement Class Members. Class Plaintiffs' Co-Lead Counsel, subject to approval of the Court, shall provide Court-approved supplemental notice to Akzo Settlement Class Members describing the plan of distribution, affording Akzo Settlement Class Members an opportunity to be heard with respect to such plan of distribution, and providing Akzo Settlement Class Members with a Court-approved Claim Form.

Class Plaintiffs shall take all necessary and appropriate steps to ensure that notice of the Settlement Hearing is provided in accordance with the order of the Court. Notice of the Settlement Hearing shall also be given by publication one day a week for two consecutive weeks in the national edition of THE WALL STREET JOURNAL and once in FEEDSTUFFS and the CHEMICAL MARKET REPORTER, as soon after preliminary approval by the Court of the Settlement as is reasonably practicable. Notice shall also be given by publication on the web sites of Class Plaintiffs' Co-Lead Counsel and, subject to Court ap-



proval. on the Court's web site. In no event shall Akzo be responsible for giving notice of this Settlement to members of the Akzo Settlement Class, except as provided in paragraph 12 below.

6. Motion for Entry of Final Judgment. Class Plaintiffs' Co-Lead Counsel shall submit a motion for final approval of the Settlement by the Court, after notice to the members of the Akzo Settlement Class of the Settlement Hearing. If the Court approves the Settlement, the parties hereto shall jointly seek entry of an order and final judgment, in the form attached hereto as Exhibit D:

(a) fully and finally approving the certification of the Akzo Settlement Class and the Settlement contemplated by this Agreement and its terms as being a fair, reasonable and adequate settlement within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its consummation pursuant to its terms and conditions;

(b) directing that the Class Action be dismissed with prejudice as to Akzo and, except as provided for herein, without costs;

(c) discharging and releasing the Releasees from all Released Claims;

(d) reserving continuing and exclusive jurisdiction over the Settlement, including its administration;

(e) determining pursuant to Fed. R. Civ. P. 54(b) that there is no just reason for delay and directing that the judgment of dismissal of the Class Action as to Akzo shall be final and appealable; and

(f) directing that, for a period of five years, the Clerk of the Court shall preserve the record of those members of the Akzo Settlement Class that have timely excluded themselves from the Settlement and that a certified copy of such record shall be provided to Akzo at its expense.

7. Settlement Consideration. Subject to the provisions hereof, and in full, complete and final settlement of the Class Action as provided herein, Akzo agrees to pay the Akzo Settlement Class the following amount in the event that the Settlement receives Final Approval. Within 10 business days after such approval, Akzo shall pay \$7,500,000, together with an amount equal to the simple interest on \$7,500,000 at the rate of nine and one-half percent (9.5%) per year, for the period beginning on August 15, 2000 and ending on the date payment is made, in United States funds, into the Escrow Account, for distribution to Akzo Settlement Class Members and for payment of any attorneys' fees, costs, expenses or other disbursements other than those expressly provided for in paragraph 12(a) of this Agreement, all subject to Court approval.

8. Escrow Account. The Escrow Account shall be established and administered under the Court's continuing supervision and control. Payments into the Escrow

Account shall, when paid, be invested in instruments secured by the full faith and credit of the United States and any interest earned shall become part of the Settlement Fund.

9. Qualified Settlement Fund. The Escrow Account is intended by the parties hereto to be treated as a "qualified settlement fund" for federal income tax purposes pursuant to Treas. Reg. § 1.468B-1, and to that end the parties hereto shall cooperate with each other and shall not take a position in any filing or before any tax authority that is inconsistent with such treatment. At the request of Akzo, a "relation back election" as described in Treas. Reg. § 1.468B-1(j) shall be made so as to enable the Escrow Account to be treated as a qualified settlement fund from the earliest date possible, and the parties hereto shall take all actions as may be necessary or appropriate to this end. The Claims Administrator previously approved by the Court in this litigation shall pay taxes or estimated taxes on any income earned on the funds in the Escrow Account and all related costs and expenses from the Escrow Account, after approval by the Court and whether or not Final Approval has occurred. In the event federal or state income tax liability is finally assessed against and paid by Akzo as a result of any income earned on the funds in the Escrow Account, Akzo shall be entitled to reimbursement of such payment from the funds in the Escrow Account, after approval by the Court and whether or not Final Approval has occurred. Akzo will use its best efforts to resist any such assessment or payment.

10. Termination by Akzo or the Akzo Settlement Class. Class Plaintiffs' Co-Lead Counsel shall, within twenty (20) business days after the Court-ordered deadline for

timely requests for exclusion from the Akzo Settlement Class, cause to be provided to counsel for Akzo a list of those members of the Akzo Settlement Class who have timely excluded themselves from the Akzo Settlement Class. Class Plaintiffs' Co-Lead Counsel also shall cause counsel for Akzo to be provided with a copy of each request for exclusion from the Akzo Settlement Class as they are received.

Class Plaintiffs' Co-Lead Counsel shall have an option to terminate this Agreement, and thus prevent Final Approval, if companies totaling in number more than an additional twenty percent (20%) relative to the opt-outs from the Choline Chloride Settlement Class that was approved by this Court on March 28, 2000, choose to remain in the Akzo Settlement Class. Akzo shall have an option to terminate this Agreement, and thus prevent Final Approval, if companies totaling in number more than an additional twenty percent (20%) relative to the opt-outs from the Choline Chloride Settlement Class that was approved by this Court on March 28, 2000, choose to opt out of the Akzo Settlement Class.

To exercise the option to terminate this Agreement, Class Plaintiffs' Co-Lead Counsel or Akzo, as the case may be, shall give notice of its intent to do so to the other in accordance with paragraph 27 of this Agreement, within thirty (30) business days after the Court-ordered deadline for timely requests for exclusion from the Akzo Settlement Class, or, if a dispute arises as to whether one or more members have submitted untimely or otherwise invalid requests for exclusion from the Akzo Settlement Class and the resolution of the dis-

pute could affect whether a party has the option to terminate this Agreement, within ten (10) business days after the resolution of the dispute, whichever is later.

11. All Claims Satisfied by Settlement Fund. Each Akzo Settlement Class Member shall look solely to the Settlement Fund for settlement and satisfaction, as provided herein, of all claims released by the Akzo Settlement Class pursuant to paragraph 15 hereof. Except as provided by order of the Court pursuant to this Agreement, no Akzo Settlement Class Member shall have any interest in the Settlement Fund or any portion thereof.

12. Payment of Expenses. (a) In the event that the Court preliminarily approves the Settlement pursuant to paragraphs 4 and 5 hereof, within ten (10) business days after receipt of notification from the Claims Administrator of the amount of Court-approved costs and expenses associated with the provision of notice to the members of the Akzo Settlement Class, Akzo shall pay that amount to the Claims Administrator in United States funds. Thereafter, on a basis no more frequent than quarterly, the Claims Administrator shall provide Akzo with a statement identifying the Court-approved costs and expenses associated with the provision of any notice to the members of the Akzo Settlement Class, otherwise incurred in administering the Settlement and/or incurred in distributing the Settlement Fund, and Akzo shall pay that amount to the Claims Administrator in United States funds within ten (10) business days after receipt of the statement. If Akzo challenges any amount listed on a statement after discussing it with the Claims Administrator, Akzo may apply to the Court to resolve the matter within ten (10) business days after the deadline for payment, and withhold payment of

the challenged amount pending resolution by the Court. If any other Defendants enter into a settlement or settlements with the Class, Class Plaintiffs' Co-Lead Counsel and the Claims Administrator shall, to the extent reasonably practicable, administer the Settlement and the other settlement(s) and distribute funds to Akzo Settlement Class Members in ways that permit costs and expenses to be shared equally by amounts paid by each affiliated group of settling Defendants (e.g., by using a single notice of two or more settlements, by using combined mailings, by making payments to Akzo Settlement Class Members from all applicable settlement funds at the same time). The maximum aggregate amount Akzo shall be required to pay under this paragraph 12(a) shall be \$400,000 (United States funds).

(b) Except as provided in paragraph 12(a) hereof, Akzo shall not be liable for any of the costs or expenses of the litigation of the Class Action, including without limitation attorneys' fees; fees and expenses of expert witnesses and consultants; and costs and expenses associated with discovery, motion practice, hearings before the Court or the Special Master, appeals, trials or the negotiation of other settlements; provided, however, that Akzo shall pay a pro rata share of any fees or expenses of the Special Master incurred to consider a dispute involving Akzo concerning this Agreement. After Final Approval, all such costs and expenses as are approved by the Court may be paid out of the Settlement Fund. Reimbursement of Class Plaintiffs' Counsel shall be limited to the amount of any costs and expenses properly allocated to the Settlement Fund, on a proportional basis, taking into account such other settlement funds obtained from other Defendants then available to Class Plaintiffs.

13. Distribution of Settlement Funds Conditioned Upon Final Approval.

After Final Approval and subject to prior Court order, disbursements may be made from the Settlement Fund to pay, on an interim basis, any reasonable costs and expenses as provided in paragraph 12(b) hereof. Such interim disbursements may be made prior to the time when the balance of the Settlement Fund less all taxes, costs and expenses payable therefrom is distributed to the members of the Akzo Settlement Class pursuant to a plan of distribution approved by the Court.

14. Court Approval of All Distributions. Court approval shall be required prior to any disbursement or any distribution from the Settlement Fund.

15. Releases. In addition to the effect of any final judgment entered in accordance with this Agreement, in the event that this Agreement is approved by the Court after the Settlement Hearing, each Releasee shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, damages whenever incurred, liabilities of any nature whatsoever, including without limitation costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, asserted or unasserted, in law or in equity, which Releasors or any of them, whether directly, representatively, derivatively or in any other capacity, ever had, now have or hereafter can, shall or may have, relating in any way to any conduct prior to the date of this Agreement, concerning the purchase, sale or pricing of Vitamin Products and any and all other vitamins or relating to any conduct alleged in the Class Action including, without limitation, any

such claims that have been asserted or could have been asserted in the Class Action against the Releasees or any of them, except that this release shall not affect the rights of Releasors or any of them (i) to seek damages or other relief from any person with respect to any Vitamin Products or vitamins purchased directly from the manufacturer (or any subsidiary or affiliate thereof) outside the United States for delivery to a destination outside the United States, or (ii) to participate in or benefit from any relief or other recovery as part of a settlement or judgment on behalf of a class of indirect purchasers of Vitamin Products. The claims covered by the foregoing release are referred to herein collectively as the "Released Claims".

16. Waiver of Rights. In addition to the provisions of paragraph 15, each Akzo Settlement Class Member hereby expressly agrees that, upon Final Approval, it waives and releases with respect to the Released Claims, to the fullest extent permitted by law, any and all provisions, rights and benefits conferred by (a) § 1542 of the California Civil Code, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

and (b) any similar state, federal, or other law, rule or regulation or principle of common law. Each Releasor may hereafter discover facts other than or different from those that Releasor knows or believes to be true with respect to the subject matter of the Released Claims, but each Releasor hereby expressly agrees that, upon Final Approval, it shall have waived and fully, finally and forever settled and released any known or unknown, suspected or unsus-



pected, asserted or unasserted, contingent or non-contingent claim with respect to the Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such other or different facts.

17. Reservation of Claims. The members of the Akzo Settlement Class intend by this Agreement to settle with and release only the Releasees that such Akzo Settlement Class Members have released pursuant to paragraphs 15 and 16 hereof, and the parties do not intend this Agreement, any part hereof or any other aspect of the proposed settlement or release, to release or otherwise affect in any way any rights any Akzo Settlement Class Member has or may have against any other party or entity whatsoever other than the Releasees released by such Akzo Settlement Class Member pursuant to paragraphs 15 and 16 hereof. More particularly, the fact or terms of this Settlement with Akzo and the releases contained herein shall not be construed to release or limit in any manner whatsoever the joint or several liability or damage responsibility of any Defendant or alleged co-conspirator other than the Releasees for the alleged conspiracies, sales or other acts alleged in these actions, including, but not limited to, any alleged damage or responsibility for any of the acts of the Releasees. In addition, the releases set forth in paragraphs 15 and 16 hereof shall not release any product liability or breach of contract claims unrelated to the subject matter of the Class Action.

18. Most Favored Nation. The Akzo Settlement Class Members agree that they will not settle their claims relating to choline chloride against any Defendant that manufactured, distributed or sold choline chloride, or that had an ownership interest of more than

25% in a Defendant that manufactured, distributed or sold choline chloride, for less than the amount, not including interest, to be paid by Akzo into the Settlement Fund pursuant to paragraph 7 hereof, exclusive of costs and expenses of the kind that are to be paid pursuant to paragraph 12(a) hereof (the "threshold amount"), unless Class Plaintiffs' Co-Lead Counsel has reasonably concluded that continued litigation against a Defendant in order to obtain a judgment or settlement in an amount equal to or greater than the threshold amount, exclusive of costs and expenses of the kind that are to be paid pursuant to paragraph 12(a) hereof, is unreasonable given the risks of litigation and/or collection. As used in this paragraph, "Defendant" means a corporation or other juridical entity, or a group of such entities that are affiliates, i.e., control one another or are under common control.

19. Cooperation. Effective upon Final Approval of this Settlement, Akzo agrees to cooperate with Class Plaintiffs in the prosecution of their claims in the Class Action. Such cooperation shall include:

- (a) using Akzo's best efforts to secure the full and truthful cooperation with Class Plaintiffs of its current and former officers, directors and employees;
- (b) making current officers, directors and employees available at mutually agreed times and places, at Akzo's expense, for interviews and for sworn testimony at pretrial depositions and at trial, if needed;

(c) using Akzo's best efforts to make former officers, directors and employees available at mutually agreed times and places, at Akzo's expense, for interviews and for sworn testimony at pretrial depositions and at trial, if needed; and

(d) providing copies of non-privileged documents within Akzo's possession, custody or control that evidence or corroborate the facts and events that relate to any issues alleged or raised in the MDL Proceedings or described by such persons.

Class Plaintiffs agree to coordinate any requests for cooperation with each party with whom Akzo has entered into an agreement which contains a similar cooperation provision so as to minimize the burden and expense to Akzo and its current and former officers, directors and employees. Akzo shall keep Class Plaintiffs' Co-Lead Counsel informed concerning the identities of any such parties. Nothing herein is intended or shall be interpreted (i) to prevent any present or former officer, director or employee of Akzo from asserting, where appropriate, whether during a deposition, an informal interview or otherwise, any Fifth Amendment privilege against self-incrimination or any attorney-client privilege held by him in his individual capacity, (ii) to require Akzo to waive or breach any attorney-client or other privilege, including without limitation attorney work-product, or to disclose information obtained in a joint defense relationship, whether any such privilege or relationship already exists or is created in the future, or (iii) to require Akzo to provide information which does not expressly

concern the North American market and which could support recovery against Akzo on a claim that is not a "Released Claim" as defined in paragraph 15 of this Agreement.

20. Discovery. As of the date of this Agreement, Class Plaintiffs shall suspend any discovery requests insofar as they seek information, documents or testimony from Akzo or any other Releasee hereunder, and Class Plaintiffs agree to adjourn any other deadlines in the Class Action insofar as they apply to Akzo or any other Releasee until such time as Final Approval is obtained or until 30 days after this Agreement is terminated.

21. Protection Against Double Class Recovery. Notwithstanding anything to the contrary contained in this Agreement, in consideration of the terms hereof and in order to induce Akzo to enter into this Agreement, Akzo Settlement Class Members shall exclude from the dollar amount collectable against any person in the Class Action or any other action on any final judgment on any claim comparable to the Released Claims an amount equal to the percentage or amount of such judgment for which any Releasee would be responsible pursuant to a valid and enforceable claim for contribution and/or indemnification, if any (other than any such claim that arises out of any voluntarily assumed contribution and/or indemnification obligation of such Releasee). Akzo and Class Plaintiffs' Co-Lead Counsel agree that no such valid and enforceable claim for contribution and/or indemnification presently exists as a matter of law. The Akzo Settlement Class Members agree that the undertaking set forth in this paragraph is not only for the benefit of the Releasees but also for the benefit of any person

against whom any such judgment is entered and that this undertaking may be enforced by any such person as a third-party beneficiary hereof.

22. Effect of Disapproval. If the Court does not approve this Agreement in its entirety, or if such approval is modified or set aside on appeal, or if the Court does not enter the final judgment provided for in paragraph 6 hereof, or if the Court enters the final judgment and appellate review is sought and, on such review, such final judgment is not affirmed in its entirety, or if either Akzo or Class Plaintiffs' Co-Lead Counsel exercise their right to terminate this Agreement under paragraph 10, then this Agreement (excepting paragraphs 12(a), 20 and 28 hereof) shall be canceled and terminated and shall become null and void, and the Settlement Fund (including any and all income earned thereon net of federal taxes) shall be returned to Akzo. The parties expressly reserve all of their rights if the Settlement does not become final in accordance with the terms of this Agreement.

23. Consent to Jurisdiction. Akzo Nobel Chemicals B.V., Akzo Nobel Inc. and each Akzo Settlement Class Member hereby irrevocably submits to the exclusive jurisdiction of the Court for any suit, action, proceeding or dispute arising out of or relating to this Agreement or the applicability of this Agreement and its exhibits. Without limiting the generality of the foregoing, it is hereby agreed that any dispute concerning the provisions of paragraphs 15, 16, or 21 hereof, including but not limited to any suit, action or proceeding in which the provisions of paragraphs 15, 16, or 21 hereof are asserted as a defense in whole or in part to any claim or cause of action or otherwise raised as an objection, constitutes a suit,

action or proceeding arising out of or relating to this Agreement and its exhibits. In the event that the provisions of paragraphs 15, 16, and/or 21 hereof are asserted by any Releasee as a defense in whole or in part to any claim or cause of action or otherwise raised as an objection in any suit, action or proceeding, it is hereby agreed that such Releasee shall be entitled to a stay of that suit, action or proceeding until the Court has entered a final judgment no longer subject to any appeal or review determining any issues relating to the defense or objection based on such provisions. Solely for purposes of such suit, action or proceeding, to the fullest extent that they may effectively do so under applicable law, the Akzo Settlement Class Members and Akzo irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court or that the Court is in any way an improper venue or an inconvenient forum. Nothing herein shall be construed as a submission to jurisdiction for any purpose other than enforcement of this Agreement.

24. Resolution of Disputes: Retention of Jurisdiction. Any disputes between or among Akzo and any Akzo Settlement Class Member or Members concerning matters contained in this Agreement shall, if they cannot be resolved by negotiation and agreement, be submitted to the Court. The Court shall retain jurisdiction over the implementation and enforcement of this Agreement.

25. Binding Effect. This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto. Without limiting the generality of

the foregoing, each and every covenant and agreement herein by Class Plaintiffs and their counsel shall be binding upon all Akzo Settlement Class Members.

26. Authorization to Enter Settlement Agreement. The undersigned representative of Akzo represents that he is fully authorized to enter into and to execute this Agreement on behalf of Akzo. Class Plaintiffs' Co-Lead Counsel represent that they are fully authorized to conduct settlement negotiations with defense counsel on behalf of Class Plaintiffs and Class Counsel and to enter into, and to execute, this Agreement on behalf of the Akzo Settlement Class and Class Counsel, subject to Court approval pursuant to Fed. R. Civ. P. 23(e).

27. Notices. All notices under this Agreement shall be in writing. Each such notice shall be given either by (a) hand delivery; (b) registered or certified mail, return receipt requested, postage pre-paid; (c) Federal Express or similar overnight courier; or (d) facsimile and first class mail, postage pre-paid and, in the case of either (a), (b), (c) or (d) shall be addressed, if directed to any Class Plaintiff or Akzo Settlement Class Member, to Class Plaintiffs' Co-Lead Counsel at their addresses set forth on the signature pages hereof, and if directed to Akzo, to its representative at the address set forth on the signature pages hereof or such other address as Class Plaintiffs' Co-Lead Counsel or Akzo may designate, from time to time, by giving notice to all parties hereto in the manner described in this paragraph.

28. No Admission. Whether or not this Agreement becomes final or is terminated pursuant to paragraphs 10 or 22 hereof, the parties expressly agree that this

Agreement and its contents, including its exhibits, and any and all statements, negotiations, documents and discussions associated with it, shall not be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing or of the truth of any of the claims or allegations contained in the complaint in the Class Action or any other pleading, and evidence thereof shall not be discoverable or used, directly or indirectly, in any way, whether in the Class Action or in any other action or proceeding.

29. Intended Beneficiaries. Except as expressly provided in paragraph 21 hereof, no provision of this Agreement shall provide any rights to, or be enforceable by, any person or entity that is not an Akzo Settlement Class Member, a Releasee or Class Counsel. No Akzo Settlement Class Member or Class Counsel may assign or otherwise convey any right to enforce any provision of this Settlement Agreement.

30. No Conflict Intended. Any inconsistency between this Agreement and the exhibits attached hereto shall be resolved in favor of this Agreement. The headings used in this Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Agreement.

31. No Party Is the Drafter. None of the parties hereto shall be considered to be the drafter of this Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.



32. Choice of Law. All terms of this Agreement and the exhibits hereto shall be governed by and interpreted according to the substantive laws of the State of New York without regard to its choice of law or conflict of laws principles.

33. Amendment; Waiver. This Agreement shall not be modified in any respect except by a writing executed by all the parties hereto, and the waiver of any rights conferred hereunder shall be effective only if made by written instrument of the waiving party. The waiver by any party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent or contemporaneous, of this Agreement.

34. Execution in Counterparts. This Agreement may be executed in counterparts. Facsimile signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this Agreement and filed with the Court.

35. Integrated Agreement. This Agreement contains an entire, complete, and integrated statement of each and every term and provision agreed to by and between the parties hereto, and it is not subject to any condition not provided for herein.

36. Construction. This Agreement shall be construed and interpreted to effectuate the intent of the parties, which is to provide, through this Agreement, for a complete resolution of the Released Claims with respect to the Releasees.

IN WITNESS WHEREOF, the parties hereto, through their fully authorized representatives, have executed this Agreement as of the date first herein above written.

AKZO NOBEL CHEMICALS B.V. and  
AKZO NOBEL INC.

By: 

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## **EXHIBIT A**

## NON-RELEASED PARTIES

Alusuisse Lonza Group Ltd.  
Bioproducts, Inc.  
Chinook Group, Inc.  
Chinook Group Ltd.  
Cope Investments, Ltd.  
DCV, Inc.  
Degussa-Huls Corporation  
Degussa-Huls AG  
Degussa Inc.  
DuCoa LP  
E. Merck  
EM Industries, Inc.  
Lonza Inc.  
Lonza AG  
Merck KgaA  
Mitsu & Co., Ltd.  
Nepera, Inc.  
Nippon Soda Company, Ltd.  
Novus International, Inc.  
Reilly Chemicals, S.A.  
Reilly Industries, Inc.  
Sumitomo Chemical America, Inc.  
Sumitomo Chemical Co., Ltd.  
Tanabe Seiyaku Company, Ltd.  
Tanabe U.S.A., Inc.  
UCB S.A.  
UCB, Inc.  
Russ Cosburn  
Peter Copland  
Antonio Felix  
J.L. (Pete) Fischer  
Lindell Hilling  
John Kennedy  
Robert Samuelson  
Patrick Stayner



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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IN RE: VITAMINS ANTITRUST LITIGATION

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Misc. No. 99-197 (TFH)  
MDL No. 1285

This document relates to:

ANIMAL SCIENCE PRODUCTS, INC., et al.,

Plaintiffs,

v.

CHINOOK GROUP, LTD., et al.,

Defendants.

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**CLASS PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF MOTION FOR FINAL APPROVAL  
OF SETTLEMENT BETWEEN CLASS PLAINTIFFS AND  
AKZO DEFENDANTS AND FOR ENTRY OF FINAL JUDGMENT**

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## **I. INTRODUCTION**

Class Plaintiffs respectfully submit this memorandum in support of their motion for an order granting final approval of their settlement with Defendants Akzo Nobel Chemicals B.V. and Akzo Nobel Inc. (the “Akzo Defendants” or “Akzo”) of all claims relevant to these defendants in this international price-fixing class action.

Pursuant to the Settlement Agreement (“Settlement”),<sup>1</sup> Akzo—which did not sell choline chloride in the United States and therefore had no share of the United States market for choline chloride—will make a cash payment of \$7,500,000 to be made available to the members of the Akzo Settlement Class.<sup>2</sup> The Akzo Settlement Class includes all persons and entities who directly purchased Vitamin B4 (choline chloride) in the United States or for delivery in the United States from any of the Defendants or their co-conspirators from January 1, 1988 through December 31, 1998 (excluding all governmental entities, any Defendants, their co-conspirators, and their respective subsidiaries and affiliates). In exchange, the Akzo Settlement Class will dismiss all claims against Akzo.

In its Order of November 23, 1999, this Court previously certified a choline chloride Settlement Class in conjunction with the partial settlement with defendant BASF that this Court

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<sup>1</sup>A full copy of the Akzo Settlement Agreement with exhibits was attached (and is herein referenced for the sake of efficiency) as Exhibit 1 to the Class Plaintiffs’ Memorandum in Support of Motion for Preliminary Approval of Settlement Between Class Plaintiffs and Akzo Defendants and for Conditional Certification of a Settlement Class, filed on or about December 14, 2000 (cited herein as “Preliminary App. Motion, Ex. 1). A copy is also attached to the Final Order.

<sup>2</sup> The time for either side to invoke the termination provision in the Settlement has passed.

preliminarily approved at that time and finally approved in its Order of March 31, 2000.<sup>3</sup> This Akzo Settlement compares favorably with the previously approved choline chloride class settlement with Defendant BASF. Like Akzo, BASF had no United States market share and settled with its initial payment at \$5 million.

As previously stated to the Court, this litigation arises out of a worldwide conspiracy or conspiracies to fix prices and allocate markets for the sale of bulk vitamins. For almost a decade, officials of some of the world's largest vitamin manufacturers secretly met and agreed to artificially raise the prices of bulk vitamins sold in the United States and elsewhere. In order to artificially raise and stabilize prices for vitamins in the United States, those vitamins manufacturers conducted their price-fixing activities on an international scale and agreed, among other things, to allocate markets worldwide. The collusive conduct exposed in this Class Action artificially raised prices of bulk vitamins, including choline chloride, in the United States for an extended period of time.

**A. Plaintiffs' Investigation and Subsequent Litigation Underlie This Settlement.**

This is the second class settlement in this litigation. On March 31, 2000, this Court granted final approval to Class Plaintiffs' first settlement with seven international companies and their affiliates regarding certain bulk vitamin products, including approval of their settlement with BASF regarding choline chloride. Those settling defendants' sales represented more than 90% of the total market for the vitamin products subject to the settlement.

Class Plaintiffs previously summarized the more than three years of investigation and litigation that culminated in the prior settlement, as well as producing the Akzo Settlement currently

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<sup>3</sup>The Akzo Settlement Class encompassed in this Settlement and conditionally certified in the Court's Order of March 9, 2001, has a longer class period—1988 through 1998—than the earlier certified Choline Chloride Settlement Class (1992 through 1995).

before the Court. By way of brief review, Class Plaintiffs uncovered illegal conspiratorial conduct among bulk vitamin producers before any grand jury handed down indictments, before the federal cooperation agreements became public, and before any defendants confessed to their wrongdoing.<sup>4</sup> By so doing, and by their continuing efforts to obtain redress for the wrongs committed, Class Plaintiffs have substantially contributed to the enforcement of our Nation's antitrust laws and have helped to restore market efficiency to a critical segment of this country's economy. See for greater detail, Memorandum of Support of Class Plaintiffs' Motion for Final Approval of Class Action Settlement at 12-18, filed March 15, 2000.

At the same time, Class Plaintiffs have continued to investigate the choline chloride industry and have reached cooperation agreements with several individual defendants. In addition to information learned through the fact-finding process, Plaintiffs' Co-Lead Counsel also took into consideration guilty pleas, entered into by various former employees of the choline chloride manufacturers. These individuals and former conspirators pleaded guilty to federal charges that, beginning in 1988, they participated in an unlawful agreement to suppress or eliminate competition by fixing the price and allocating the volume of choline chloride sold in the United States in violation of the federal antitrust laws. In addition to investigations conducted on behalf of the Class Plaintiffs, Plaintiffs' Co-Lead Counsel consulted with experts retained to evaluate the claims of the Settlement Class and defenses that might be asserted thereto. Information obtained from all these sources helped produce the present Settlement with Akzo.

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<sup>4</sup>Hoffman-LaRoche's CEO, Franz Humer, has stated that it was only the class action lawsuits which prompted an internal Roche investigation sufficient to uncover Roche's illegal conduct. See Exh. 35 to Class Plaintiffs' Consolidated Reply Memorandum in Further Support of Class Certification, filed June 12, 2001.

**B. The Proposed Settlement Benefits the Akzo Settlement Class.**

The proposed Settlement provides substantial benefits to the Akzo Settlement Class. The members of the Akzo Settlement Class are those entities that directly purchased choline chloride in the United States or for delivery in the United States, from any of the Defendants or their co-conspirators, from January 1, 1988 through December 31, 1998. Preliminary App. Motion, Ex. 1, ¶ 1. Pursuant to the Settlement Agreement, Akzo must make \$7.5 million available to the Akzo Settlement Class plus simple interest from August 15, 2000, at the rate of 9.5 percent. Settlement Agreement (Preliminary App. Motion, Ex. 1), ¶ 7. Almost \$600,000 in interest has accumulated to date.

The Settlement Agreement also obligates Akzo to pay for Court-approved costs and expenses, up to \$400,000, associated with notice to members of the Akzo Settlement Class, administration of the settlement, and distribution of the Akzo Settlement Fund. *Id.* at ¶ 12(a). Finally, the Akzo Defendants are required to cooperate with Class Plaintiffs in their ongoing prosecution of this litigation against the remaining defendants. *Id.* at ¶ 19.

In exchange for the consideration provided by the Agreement, members of the Akzo Settlement Class will release all claims against the Akzo Defendants related to the conduct alleged in the Class Action. This release does not include any potential or current claims based upon purchases of Vitamin Products and Choline Chloride sold outside the United States for delivery outside the United States. *Id.* at ¶ 15. Furthermore, the Akzo Settlement Class members will not relinquish their rights to participate in class actions based on their indirect purchases of Vitamin Products as defined in the Settlement Agreement, including Choline Chloride. *Id.* at ¶¶ 2(o), 15.



**C. The Settlement Was Negotiated at Arm's Length by Knowledgeable Counsel.**

Class Plaintiffs' counsel and Akzo's counsel, who are experienced and knowledgeable antitrust and class action attorneys, negotiated the Settlement Agreement after extensive, arduous arm's length negotiations undertaken in good faith, and after substantial factual investigation and legal analysis of the claims and defenses of the parties. Class Plaintiffs' counsel believe that the Settlement now before the Court is fair, reasonable and adequate to the Akzo Settlement Class.

**D. Notice of Settlement and Hearing Has Been Provided.**

Copies of the Notice of Proposed Settlement with Akzo Nobel and Hearing Thereon were mailed on April 4, 2001 by first class mail, postage pre-paid, to all potential members of the Akzo Settlement Class, to the extent they could be identified from the database of customers created by the Claims Administrator.<sup>5</sup> Affidavit of Edward J. Sincavage, CPA, previously filed June 18, 2001 at ¶ 2. A total of 6,445 notices have been mailed. *Id.* at ¶¶ 2-3. In compliance with the Court's Order of March 9, 2001 and the Settlement Agreement at ¶ 5 (publication to occur as soon as practicable after mailing but at least 30 days prior to the Settlement Hearing), summary notices of the proposed Settlement were published in *The Wall Street Journal* on April 13, and April 20, 2001, in *Feedstuffs* on April 16, 2001, and in *Chemical Market Reporter* on April 16, 2001. The Notices alerted class members to the time and place of this Court's hearing on the proposed Settlement and directed them to additional sources of information, including access to the documents at the Court's website. *See id.* at ¶ 4 and copies of the mailed and published notices attached to that Affidavit.

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<sup>5</sup> Because of a problem in printing, the notices were actually mailed three business days late. Nonetheless, only one request for exclusion (from Lamar Distributing Co.) was postmarked after the opt-out date. Plaintiffs' counsel recommend that that request to opt out be permitted.

**E. No Objections Have Been Filed.**

Pursuant to the Court's Order of March 9, 2001, class members wishing to be excluded from the Akzo Settlement Class were to mail written requests postmarked on or before May 14, 2001, to the Claims Administrator. A list of those entities requesting exclusion from the Akzo Settlement Class is attached to the Final Order. Similarly, class members were to notify counsel for plaintiffs and counsel for defendants of any objection to the Settlement by May 14. *Id.* at ¶ 11. No objections to the Settlement have been received.

**II. STANDARD FOR JUDICIAL APPROVAL OF THE PROPOSED CLASS ACTION SETTLEMENT.**

Federal Rule of Civil Procedure 23(e) provides that:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Approval of a proposed class action settlement is within the discretion of the court. United States v. District of Columbia, 933 F.Supp. 42, 67 (D.D.C. 1996). "In determining whether settlement should be approved, the court must decide whether it is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by the settlement rather than pursued." MANUAL FOR COMPLEX LITIGATION, THIRD, § 30.42 at p. 238 (1995); see also 7 B Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, § 1797.1 at 378-79 (1986 Supp. 1999). The Rule 23 requirements are fully consistent with the long-standing judicial attitude favoring settlement. See, e.g., Hennessy v. Bacon, 137 U.S. 78, 85 (1890). This policy of encouraging settlements is

particularly appropriate in class actions, which are often complex, drawn out and demanding on limited judicial resources. Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993).

The discretion accorded to courts in approving settlements recognizes that “evaluation of [a] proposed settlement in this type of litigation...requires an amalgam of delicate balancing, gross approximations and rough justice,” and the trial court’s ruling on the adequacy of a proposed compromise is given great deference. Detroit v. Grinnell Corp., 356 F.Supp. 1380, 1385 (S.D.N.Y. 1972), aff’d in part and rev’d in part on other grounds, 495 F.2d 448 (2d Cir. 1974); Thomas v. Albright, 139 F.3d 227, 231, 233 (D.C. Cir.), cert. denied, 525 U.S. 1016, 1033 (1998). “The Court must eschew any rubber stamp approval...yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.” United States v. District of Columbia, 933 F.Supp. at 47, quoting Grinnell, 495 F.2d at 462. The exercise of that discretion, however, is constrained by the “principle of preference” favoring and encouraging settlements. Pigford v. Glickman, 185 F.R.D. 82, 103 (D.D.C. 1999).

There is no single, obligatory test in this Circuit that courts must use to determine whether the proposed settlement of a class action should be approved under Rule 23(e). In re Vitamins Antitrust Litig., slip op. at 3 (Mar. 31, 2000); Pigford, 185 F.R.D. at 98. Courts consider the facts and circumstances of a case, identify the most relevant factors in the circumstances, and exercise their discretion in deciding whether the proposed settlement is “fair, adequate and reasonable.” Id.; Pigford, 185 F.R.D. at 98; Thomas, 139 F.3d at 231.

Several factors consistently have been examined by courts in this Circuit in determining whether to approve settlements in class actions:

- Whether the settlement is the result of arm’s-length bargaining. Thomas, 139 F.3d at 230-31; Pigford, 185 F.R.D. at 99-101;

- The terms of the settlement in relation to the strength of plaintiffs' case. Thomas, 139 F.3d at 231; Pigford, 185 F.R.D. at 98;
- The status of the litigation at the time of settlement. In re National Student Marketing Litig., 68 F.R.D. 151, 155 (D.D.C. 1974); Osher v. SCA Realty I, 945 F.Supp. 298, 304 (D.D.C. 1996); see Pray v. Lockheed Corp., 644 F.Supp. 1289, 1290 (D.D.C. 1986); see also Moore v. National Assoc. of Sec. Dealers, Inc., 762 F.2d 1093, 1106 (D.C. Cir. 1985);
- The reaction of the class. Thomas, 139 F.3d at 231-33; In Re National Student Marketing Litig., 68 F.R.D. at 155; Osher, 945 F.Supp. at 304; Stewart v. Rubin, 948 F.Supp. 1077, 1087 (D.D.C. 1996), aff'd, 124 F.3d 1309 (D.C. Cir. 1997);
- The opinion of experienced counsel. Stewart, 948 F.Supp. at 1087; McGinness v. Parness, 1989 WL 29817, at \*1 (D.D.C. Mar. 22, 1989).

As this Court has noted, the test is most appropriately described as “whether the settlement is adequate and reasonable and not whether a better settlement is conceivable.” In re Vitamins Antitrust Litig., slip op. at 3 (Mar. 31, 2000); quoting In Re Flat Glass Antitrust Litig., slip op. at 6 (W.D. Pa. Feb. 9, 2000).

### **III. EVALUATION OF THE SETTLEMENT DEMONSTRATES THAT IT IS FAIR, REASONABLE AND ADEQUATE AND THAT IT SHOULD BE APPROVED.**

#### **A. The Proposed Settlement Resulted From Arm's Length Negotiations By Informed, Experienced Counsel.**

This Court and other courts have deferred to the judgment of experienced counsel who have conducted arm's-length negotiations in approving proposed class settlements. See, e.g., In re Vitamins Antitrust Litig., slip op. at 5 (Mar. 31, 2000); Stewart, 948 F.Supp. at 1099; McGinness v. Parnes, 1989 WL 29814 at \*1. See also In re Lease Oil Antitrust Litig., 186 F.R.D. 403, 424-25 (S.D. Tex. 1999); In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 312-13 (N.D. Ga. 1993); 2 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 11.41 at 11-88, 11-91 (3d ed. 1992). As stated in the MANUAL FOR COMPLEX LITIGATION, THIRD, a “presumption of fairness,

adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.” *Id.* at § 30.42. That presumption clearly should attach here.

The Settlement proposed here is the product of seven months of extensive arm's-length negotiations by experienced counsel, undertaken in good faith, and after substantial factual investigation and legal analysis. Indeed, the Settlement was negotiated on behalf of the class by counsel who are among the most experienced antitrust and class action attorneys in the United States, and who have been involved in many of the major antitrust cases litigated over the last several decades.

Nothing in the course of the negotiations or the substance of the Settlement “disclose[s] grounds to doubt its fairness.” *Id.* at § 30.41. To the contrary, the arm's length nature of the negotiations and the participation of experienced advocates throughout the process strongly supports the conclusion that the proposed settlement is fair, reasonable, and adequate, and should be approved.

**B. The Proposed Settlement Terms are Fair, Reasonable and Adequate.**

**1. *Settlement Payment Terms.***

Under the terms of the Settlement Agreement, Akzo has agreed to pay \$7.5 million, plus interest now amounting to about \$600,000, to settle the claims of the Akzo Settlement Class. Preliminary App. Motion, Ex. 1, ¶ 7. The benefits of the Settlement justify final approval. The settlement amount—\$7.5 million—is significant because Akzo sold no choline chloride in the United States during the Class Period, and members of the Akzo Settlement Class are being compensated only for U.S. purchases or deliveries. Further, the Agreement requires Akzo to make Court-

approved payment of notice and administration-related costs and expenses, up to a maximum of \$400,000. Id. at ¶ 12(a).

This Settlement is a significant benefit for the Class. It provides a meaningful guarantee of recovery to class members regardless of how the litigation against the remaining non-settling defendants is resolved. See In Re Fine Paper Antitrust Litig., 1980-1 Trade Cas. (CCH) ¶ 63, 120, at 77,589, (E.D. Pa. 1979), vacated and remanded on other grounds, 632 F.2d 1081 (3d Cir. 1980) (“[p]laintiffs are guaranteed an early recovery of at least part of their claims and at the same time eliminate the risk of a totally adverse judgment.”). Because this case continues against the remaining choline chloride defendants, it is not appropriate for Class Plaintiffs to outline in detail their assessment of the strength of their case. See MANUAL FOR COMPLEX LITIGATION, THIRD, at § 30.46. As revealed by their investigation, and in light of the numerous guilty pleas by defendants in related criminal actions, Class Plaintiffs believe that the major question concerning the liability of the Settling Defendants is their lack of participation in the United States market. Given the complexities of proof in antitrust cases, plaintiffs with strong cases may nonetheless face potentially difficult obstacles while defendants pursue viable legal defenses. See, e.g., In re Catfish Antitrust Litig., 939 F.Supp. 493, 498 (N.D. Miss. 1996). Antitrust conspiracy cases are complex and difficult, and victory is never guaranteed. See, e.g., In re Art Materials Antitrust Litig., 100 F.R.D. 367, 372 (N.D. Ohio 1983) (noting “recognized difficulties of proof and requirements of a costly trial on the merits” and approving settlement); In re Cement & Concrete Antitrust Litig., 1981 WL 2039 \*3, 1981 U.S. Dist. LEXIS 11272 \*8 (D. Ariz. 1981) (recognizing “complexity and uncertainty” of legal and factual issues in antitrust case and approving settlement); In re Fine Paper Antitrust Litig., 1980-1 Trade Cas. (CCH) ¶ 63, 120, at 77,589. As one court noted in the context

of complex litigation, “no matter how confident one may be of the outcome of litigation, such confidence is often misplaced.” West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710, 743-44 (S.D.N.Y. 1970) (citing instances in which settlements were rejected by the court and plaintiffs ultimately lost at trial or recovered less than settlement amount).

As the continuing litigation has demonstrated, Class Plaintiffs anticipate that this case will entail vigorous disputes over issues of law and fact. Had the case proceeded to trial, Akzo would likely have also contested causation and impact, and would likely have challenged Class Plaintiffs’ measures of damages, based on factors such as fluctuations in foreign currency exchange rates and variations in product demand levels. The calculation of damages may also prove difficult in class cases. As demonstrated in the Consolidated Reply Memorandum In Further Support of Class Certification, however, Class Plaintiffs believe that there are viable methods for calculating damages. Given the complexities of proof in antitrust class actions regarding, among other things, conspiracy, impact and damages, Class Plaintiffs recognize that a defendant can raise many factual and legal issues, the resolution of which might be against their interests.

Further, even if Class Plaintiffs were to prevail on every issue at trial, they would face inevitable appeals, and the reality that many antitrust verdicts are reversed on appeal. See, e.g., Backman v. Polaroid Corp., 910 F.2d 10, 17-18 (1st Cir. 1990) (substantial verdict for class was reversed on appeal and the case dismissed, after 11 years of litigation); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276-308 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (multimillion dollar antitrust judgment after a lengthy trial was reversed); Telex Corp. v. International Business Machines Corp., 510 F.2d 894, 933 (10th Cir.) (per curiam), cert. dismiss’d, 423 U.S. 802 (1975) (reversing a \$259.5 million antitrust judgment for plaintiff and awarding an \$18.5

million counterclaim judgment for defendant); Trans World Airlines, Inc. v. Hughes, 312 F. Supp. 478, 479, 485 (S.D.N.Y. 1970), aff'd, 449 F.2d 51 (2d Cir. 1971), rev'd, 409 U.S. 363, 366 (1973) (\$145 million antitrust judgment was overturned, after years of litigation and appeals).

Viewed against any probable recovery, and considering the risks of protracted litigation, this Settlement falls well within the range of fair, reasonable, and adequate, and therefore merits final approval.

## **2. *Akzo's Ongoing Cooperation.***

The Settlement Agreement protects the Akzo Settlement Class members' future interests in this litigation with Akzo's agreement to provide significant cooperation to Class Plaintiffs in pursuing their remaining case against the non-settling defendants. At this stage of the litigation, this provision in the Settlement is an important benefit to the class. See In Re Mid-Atlantic Toyota Antitrust Litig., 564 F.Supp. 1379, 1386 (D. Md. 1983); In re Corrugated Container Antitrust Litig., 1980-1 Trade Cas. (CCH) ¶ 64,114, at 76,703, (S.D. Tex. 1981); In Re Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979). Preliminary App. Motion, Ex. 1, ¶ 19. Akzo has committed to use its best efforts to produce non-privileged documents, and to make current and former officers and employees available for interviews and sworn testimony. Given Akzo's cooperation, this Agreement is in the Class Plaintiffs' best interests.

## **C. Reaction of the Akzo Settlement Class to the Settlement: No Objection.**

One of the factors typically considered in determining the reasonableness of a settlement is the reaction of the class. Thomas, 139 F.3d at 231-33; In re National Student Marketing Litig., 68 F.R.D. at 155; Osher, 945 F.Supp. at 304; Stewart, 948 F.Supp. at 1057. Here, more than 6900 notices of this Court's preliminary approval of the Settlement were sent to class members, advising



the class of the Settlement. As of May 14, 2001—the Court-ordered deadline for written requests for exclusion and for objections — no objections had been received. Sincavage Affidavit at ¶ 6. There have been 263 exclusion requests, the bulk of which come from companies who opted out of the BASF choline settlement, many of whom are pursuing their own lawsuits. In short, there is no opposition to the Settlement.

#### **IV. CONCLUSION**

For the foregoing reasons, Class Plaintiffs respectfully request that the Court grant their motion for final approval of this Settlement and direct the Clerk to enter final judgment dismissing with prejudice the Akzo Defendants.

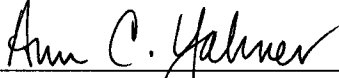
Dated: July 2, 2001

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**Co-Lead Counsel for Class Plaintiffs**

**CERTIFICATE OF SERVICE**

This is to certify that I have on this July 2, 2001 served true and correct copies of the attached CLASS PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT BETWEEN CLASS PLAINTIFFS AND AKZO DEFENDANTS AND FOR ENTRY OF FINAL JUDGMENT by electronic service pursuant to the Court's May 17, 2000 Order Regarding Electronic Service in *In re Vitamins Antitrust Litigation*, MDL-1285, to counsel of record.

*ORIGINAL SIGNATURE ON FILE*

  
\_\_\_\_\_  
ANN C. YAHNER